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No. 10-80

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

In re ASSICURAZIONI GENERALI, S.P.A.,

DR. THOMAS WEISS,
Petitioner,

v.

ASSICURAZIONI GENERALI, S.P.A., AND BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After more than a decade of litigation, Petitioner is the only claimant attempting to pursue a Holocaust-era insurance claim in any United States court. He has rejected Respondent's payment offer on his father's 1936 Czechoslovakian insurance policy under the standards of the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), endorsed by the Executive Branch as the exclusive means for resolving Petitioner's claim, as this Court recognized in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003). After *Garamendi*, Generali has paid more than $100 million through ICHEIC to thousands of claimants. In reliance on this Executive Branch policy and on *Garamendi*, the Second Circuit affirmed the dismissal of Petitioner's lawsuit, after having twice sought and received written confirmation from both the Bush and Obama Administrations that this policy, which originated in the Clinton Administration, remained applicable to Petitioner's lawsuit.

This case thus raises the following question:

Whether the Second Circuit's ruling, which simply applied *Garamendi* and lacks meaningful practical ramifications beyond Petitioner's single case, merits certiorari review.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent Assicurazioni Generali S.p.A. ("Generali") is an Italian corporation. It has no parent corporation and the only publicly held corporation that owns 10% or more of Generali's stock is Mediobanca, S.p.A., another Italian corporation.

Respondent Business Men's Assurance Company of America ("BMA") was a wholly-owned subsidiary of Generali from August 1990 until June 2003. On July 1, 2003, BMA became a wholly-owned subsidiary of Royal Bank of Canada, a Canadian corporation.

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INTRODUCTION

Petitioner is the only plaintiff in any United States court pursuing a claim against a European insurer on a Holocaust-era insurance policy.[1] All earlier cases against Generali have been settled and dismissed, and a class action settlement bars the institution of future cases by all but a small number of opt-outs.

Petitioner's case concerns a 1936 Czech insurance policy issued in local currency worth some $165 at pre-war exchange rates and valued at approximately $5,800 under ICHEIC's claimant-friendly methodology. Petitioner has eschewed ICHEIC and the equivalent programs that remain in effect today, which thousands of others have accepted. He instead has inveighed before courts, Congress, and the Executive against ICHEIC and the Executive policy upheld in *Garamendi*. He has opposed any consensual resolution of Holocaust-related claims, in the interest of self-enrichment. In 2004, in an earlier Holocaust-related case, the district court stated that Petitioner had "attempted to extort a significant cash award from a fund belonging to Holocaust survivors . . . ."[2]

The Second Circuit's unanimous decision affirming the dismissal of Petitioner's complaint was

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[1] The Petition's references to "plaintiffs" in the plural are mistaken.

[2] *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 375 (E.D.N.Y. 2004), *aff'd*, 424 F.3d 150 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006).

a routine application of *Garamendi*, where Generali was a Plaintiff-Petitioner and the Court held that:

> (1) "[R]esolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs." 539 U.S. at 420;
>
> (2) The Executive policy was that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." *Id.* at 422 (quotation omitted; alterations original);
>
> (3) The Executive policy existed independently of any Executive Agreements with European governments. *Id.* at 416-17 (stating that "[petitioners] leave their claim of preemption to rest on asserted interference with the foreign policy those agreements embody") (citations and footnote omitted); and
>
> (4) State legislation to promote litigation of Holocaust-era insurance claims was preempted because it conflicted with the Executive policy. *Id.* at 425 ("The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.").

Prior to the Second Circuit's ruling, the Bush and Obama Administrations both confirmed, at the court's request, (1) that the Executive policy that had originated in the Clinton Administration remained in force, and (2) that this policy embraced claims

against Generali despite the absence of an Executive Agreement with Italy.

This case does not present an issue of federal law with significant practical or legal consequences. Nor does it present any split between Circuit Courts, any conflict with another decision of this Court, or any departure from the accepted and usual course of judicial proceedings. Petitioner disagrees with the Second Circuit's application of *Garamendi*, but that is not a basis for certiorari review. *See* Sup. Ct. R. 10.

The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Background

Over the past decade, Petitioner has repeatedly accused Generali of cooperating with the Nazis during World War II. The historical record is clear, however, that both Generali's assets backing pre-war life insurance policies issued in Eastern European countries and the insureds' rights under such policies were nationalized by the communist governments that the Soviets installed at the conclusion of World War II. It is for that reason that the vast majority of Eastern European policies, such as the one on which the Petitioner based his claim,[3] went either unclaimed or unpaid, as the obligations

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[3] Although Petitioner alleges he is the beneficiary under multiple pre-war Generali policies issued in Eastern Europe, exhaustive research, which was accepted by ICHEIC and independent auditors, has located only the 1936 Czech policy issued to Petitioner's father noted above.

were assumed by the communist governments. Indeed, these nationalizations were recognized by 1958 legislation empowering the U.S. Foreign Claims Settlement Commission ("FCSC") to compensate claimants for assets nationalized by these governments.[4] Several claims on expropriated Generali policies are discussed in FCSC awards.[5]

B. The Federal Government's Foreign Policy That ICHEIC Should Be The Exclusive Forum For Holocaust-Era Insurance Claims

In the wake of an explosion of Holocaust-related litigation against European defendants in the 1990s, the President developed policies that would resolve these matters for the benefit of claimants world-wide in the most expeditious, and economical manner.[6] In the insurance context, the national

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[4] Title IV of the International Claims Settlement Act, 72 Stat. 527 1958, 22 U.S.C. §§ 1642-1642(p); *see generally*, Edward D. Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 Mich. L. Rev. 1079, 1086-87 (1962).

[5] *Claim of Frederick Bedrich Brunner against Czechoslovakia*, Claim No. CZ-1698, Decision No. CZ-635 (1960) (Generali policy issued in Czechoslovakia); *Claim of Bernard Dworetzky against Poland*, Claim No. PO-2320, Decision No. PO-3705 (1964) (Generali policy issued in Poland).

[6] *Garamendi*, 539 U.S. at 405 ("These suits generated much protest by the defendant companies and their governments, to the point that the Government of the United States took action to try to resolve 'the last great compensation related negotiation arising out of World War II.'") (citations omitted). This Court and lower federal courts have recognized that the issue of reparations for Holocaust victims and victims

(cont'd)

position that Holocaust-era claims be addressed exclusively through ICHEIC is beyond debate. As the Court stated in *Garamendi*, "[a]s for insurance claims in particular, the national position, expressed unmistakably . . . has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures." 539 U.S. at 421; *accord id.* at 422 (observing that deference to ICHEIC has "been consistently supported in the high levels of the Executive Branch"; quoting Secretary Eizenstat's statement in 2000 that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era"). [7] Executive Branch

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of Communist nationalizations in Eastern Europe has been a fixture of American foreign policy. *E.g., id.* at 403 (stating "[insurance policy] confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war," and discussing post-war reparations programs); *In re Nazi Era Cases Against German Defs. Litig.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001) (describing programs).

[7] *See also In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 340 F. Supp. 2d 494, 504-05 (S.D.N.Y. 2004) (canvassing numerous other official statements to the same effect). Indeed, in 2008, Mr. Eizenstat testified to the House Financial Services Committee that Generali, which participated fully in ICHEIC despite not being within the ambit of any Executive Agreement, deserved exemption from lawsuits and from legislation designed to promote lawsuits:

> I am concerned . . . [about companies] that participated fully in the ICHEIC process without the benefit of an Executive Agreement calling for a Statement of Interest in the event of litigation.
>
> *(cont'd)*

representatives have stated this policy repeatedly in congressional hearings and other public venues, and Congress has never passed a bill to a contrary effect.

C. The District Court Dismisses Petitioner's Complaint Based On *Garamendi*

Petitioner filed his lawsuit in 2000, and it was one of twenty initially consolidated by the Judicial Panel on Multidistrict Litigation; all the others have since settled. The district court succinctly explained why *Garamendi* required dismissal:

> The Supreme Court's decision in *Garamendi* compels dismissal of plaintiffs' claims seeking damages for Generali's non-payment of policy benefits. . . . [T]he Court's decision requires dismissal also of

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(cont'd from previous page)

> While there was no technical legal peace extended by the U.S. Government with respect to these companies, they nonetheless participated in good faith in a process that the United States Government had decided was the 'exclusive remedy' for resolving all Holocaust-era insurance claims. I testified before Congress on this very policy and it was broadly supported on a bipartisan basis. There is no justification for now subjecting them to some other remedy.

The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims, Hearing Before the House Committee on Financial Services, 110th Cong. 108 (2008) (statement of Stuart E. Eizenstat, Former Special Representative, President & Secretary of State on Holocaust Era-Issues

> the benefits claims arising under generally applicable state statutes and common law as well as customary international law. Litigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC. The salient fact for present purposes is that plaintiffs seek to obtain redress for Generali's non-payment of policy benefits by filing lawsuits in this country's courts; the legal justification for such claims is irrelevant.

340 F. Supp. 2d at 501 (citations and footnote omitted). The court rejected Petitioner's arguments that *Garamendi* did not extend to claims against Generali, *id.* at 503 ("Generali was one of the petitioners in *Garamendi* and the respondent, the California insurance commissioner, referred to Generali repeatedly in its briefs and at oral argument"), and that the Government's failure to submit a statement of interest or position in the district court undercut Generali's arguments. *Id.* at 506-07.

D. The Second Circuit Approves Generali's Class Settlement, And Certiorari Is Denied

After the district court's dismissal but prior to the Second Circuit's consideration of Petitioner's appeal from it, the class action plaintiffs in the consolidated proceedings entered into a settlement agreement with Generali. The class settlement was

affirmed over the objection of objectors represented by one of Petitioner's counsel (Mr. Dubbin), and this Court denied the ensuing certiorari petition. *Rubin v. Assicurazioni Generali S.p.A.*, 290 Fed. Appx. 376 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1347 (2009) (No. 08-780). The class settlement releases Generali from claims by any Holocaust victim, except a small number of persons (some 200) who opted out of the settlement, most of whom are citizens of foreign countries or have not even claimed that they or their families ever purchased a Generali policy.

Petitioner's counsel Mr. Dubbin also unsuccessfully opposed the settlement of Holocaust-era claims against Swiss banks. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005). In that matter, he was criticized by the district court for standing by while, as noted, Petitioner sought to "extort" funds from the settlement fund. *In re Holocaust Victim Assets Litig.*, *supra*.

E. At The Second Circuit's Request, Both The Bush And Obama Administrations Confirm That Foreign Policy Supports Dismissal Of Petitioner's Case

In October 2008, the Second Circuit inquired of Secretary of State Condoleezza Rice, "whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States." The Government responded directly and affirmatively that it would, and stated, inter alia:

- *"[T]o answer the Court's question, it is contrary to settled United States foreign policy*

for plaintiffs' claims to be adjudicated in the courts of the United States." Pet. App. 68a (emphasis added).

- "It has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the exclusive forum and remedy for claims within its purview." *Id.* at 57a.

- "The fact that ICHEIC has now concluded its operations does not alter the foreign policy of the United States." *Id.*

- "Claims against defendant Assicurazioni Generali ('Generali'), one of the original ICHEIC companies and an active participant in its operations, fall within the category United States policy seeks to address." *Id.*

In October 2009, the Government responded to a second request from the Second Circuit, this time addressed to Secretary of State Hilary Rodham Clinton, asking whether the Obama Administration's position remained as stated in the Government's 2008 response.[8] The Government's response again was unequivocal, and confirmed that its foreign

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[8] The Petition states that the "Department of Justice, not the State Department" responded to the Second Circuit's letters to Secretaries of State Rice and Clinton. Pet. At 5. DOJ acts as counsel for the United States, including the State Department, in all federal proceedings, *see* 28 U.S.C. § 517, and accordingly its participation on behalf of the State Department was entirely appropriate.

policy supports dismissal of Petitioner's lawsuit, in favor of voluntary payment that remains available. *See* Pet. App. 72a. The government's most recent response states:

- "The position of the United States continues to be that set out in our original letter brief. As we explained, '[i]t has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the *exclusive forum and remedy* for claims within its purview.' Holocaust-era insurance claims against the defendant, Assicurazioni Generali ('Generali'), fall within this category." *Id.* at 73a (emphasis original).

- "The Government's efforts to encourage ICHEIC are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, as well as to support broad 'legal peace' for countries and companies subject to ongoing claims. . . . *[I]mportantly, this foreign policy exists independent of [executive] agreements, and is not cabined by them or limited by their explicit terms.*" *Id.* at 75a-76a (emphasis added).

- "That policy successfully encouraged companies, including Generali, to participate in the ICHEIC process. And as Ambassador J. Christian Kennedy has explained, if suits against ICHEIC participants continue, the result could be to 'undermine the many positive working relationships we have built

over the years,' and to discourage other companies and countries from voluntarily pursuing restitution programs." *Id.* at 77a.

- "Generali was an early and active participant in ICHEIC, and along with the other ICHEIC companies it has agreed to continue processing claims in accordance with the relaxed standards of proof developed at ICHEIC. Thus, although ICHEIC has ceased operations, anyone who believes an ICHEIC insurance company has failed to pay a claim may send his application to that company or to the Holocaust Claims Processing Office of the New York State Banking Commission." *Id.*[9]

F. The Second Circuit Affirms The District Court Based On *Garamendi* And On The Government's Statements That Its Policy Supports Dismissal

Following *de novo* review, the Second Circuit affirmed the dismissal order as required *a fortiori* by *Garamendi*. *In re Assicurazioni Generali S.p.A.*, 592 F. 3d 113 (2d Cir. 2010) ("we hold under authority of *Garamendi* that Plaintiffs' claims, which fall within the scope of the ICHEIC process, are preempted by the foreign policy of the United States."):

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[9] According to the ICHEIC report summarizing its work, "Through ICHEIC's efforts, a total of $306 million was offered to 48,000 Holocaust survivors and their heirs." *Finding Claimants and Paying Them: The Creation and Workings of the International Commission on Holocaust Era Insurance Claims* at 2 (2007), available at www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf.

> The cases before us . . . seek enforcement of the plaintiffs' claimed contract rights against Generali under state law. . . . [S]uch law suits are *directly* in conflict with the Government's policy that claims should be resolved exclusively through the ICHEIC. If, as the Supreme Court held in *Garamendi,* a state disclosure requirement conflicts sufficiently to be preempted by the national foreign policy of channeling Holocaust-era insurance claims through the ICHEIC, then, *a fortiori,* a state law suit to enforce a Holocaust-era insurance claim is preempted by that policy, as well.

Id. at 118.[10]

On April 12, 2010, the Second Circuit denied Petitioner's Petition for Panel Rehearing or Rehearing En Banc. *See* Pet. App. C. This Petition followed.

REASONS FOR DENYING THE PETITION

None of Petitioners' arguments merits review.

The Second Circuit's decision does not implicate anyone other than Petitioner. All other claimants who appealed the district court's decision have settled with Generali; to our knowledge there are no other Holocaust-related insurance cases

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[10] The Second Circuit's opinion identifies three plaintiffs in addition to Petitioner. All three -- Erna Birnbaum Gottesman, Martha Birnbaum Younger and Edward David -- have settled their claims against Generali.

pending in U.S. courts, and there is no realistic prospect of any meaningful number of future claims. Petitioner, if he chose, could promptly avail himself of ongoing programs that immediately would pay him the ICHEIC value of his father's policy.

Nor does the Petition raise any substantive issues meriting review. There is no split of authority in the courts of appeal regarding application of *Garamendi*, and Petitioner does not so argue. Nor is there any dispute among the district courts, and the decisions cited by Petitioner do not support his argument that there is.

The grounds that Petitioner advances for granting the Petition all were fully addressed and rejected in *Garamendi,* as both the district court and Circuit already have explained. Likewise, the arguments advanced by *amici* in support of Petitioner are either policy preferences that clash with settled authority, or repetitions of arguments considered and rejected in *Garamendi.*

Petitioner simply is disappointed with the application to this case of the principles announced in *Garamendi.* But that is no basis for review.

A. The President's Extensive War-Related Powers Preclude Petitioner's Complaint

1. The President Is Empowered To Resolve Petitioner's Claim

In asking "Does *Garamendi* Preempt State Common Law Claims?", Pet. at 9, Petitioner poses the wrong question. His claims are preempted not by *Garamendi*, but rather by the Executive's long-established foreign policy, upheld in *Garamendi*, that all Holocaust-era insurance claims should be addressed by ICHEIC and similar voluntary programs, not through litigation. As the Court explained in *Garamendi*, the power to dispose of these specific claims is "well within" the President's responsibilities:

> To begin with, resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations" between the countries involved, there is a "longstanding practice" of the national Executive to settle them . . . .

539 U.S. at 420.

The Court also held that the "evidence of clear conflict" between "*the consistent Presidential foreign policy* . . . to encourage European governments and companies to volunteer settlement funds in

preference to litigation," and California's "different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors," preempted that state's disclosure statute. *Id.* at 421, 423 (emphasis added).

Petitioner ignores fundamental principles in suggesting that, in the arena of foreign relations in the aftermath of foreign wars, the Federal Government may not limit claims based on a State's common law. This Court has made clear on numerous occasions that "as regards U.S. foreign relations, the states 'do not exist.'" Louis Henken, *Foreign Affairs and the United States Constitution* 150 (2d ed. 1996) (quoting *United States v. Belmont*, 301 U.S. 324, 331 (1937)). As Justice Douglas wrote in *United States v. Pink*, 315 U.S. 203, 233-34 (1942), on which *Garamendi* relied:

> No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

2. None Of The Decisions That Petitioner Cites Calls *Garamendi* Into Question

Petitioner points to the Court's decisions addressing the scope of federal statutory preemption of state law claims held by plaintiffs injured by cigarettes (*Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008)), medications (*Wyeth v. Levine*, 129 S. Ct. 1187 (2009)) and nuclear materials (*Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984)).[11] But all these involve circumstances -- personal injuries resulting from purely domestic activities -- in which states unquestionably have a role and the Court must determine whether Congress has the ability to displace state law, and if so, whether it intended to do so. No such analysis is warranted here, where extinguishment of claims in favor of an alternative resolution procedure, is based on the National Government's *complete* and *exclusive* primacy in the sphere of foreign affairs. The *Garamendi* Court made very plain that, unlike in the preemption cases cited by Petitioner, there is no state interest sufficient to overcome Executive primacy in this sphere:

> The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield. If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's

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[11] Although both *Levine* and *Good* postdate *Garamendi*, neither even cites it, let alone purports to alter it.

> favor, given the weakness of the State's interest . . . . [T]here is no serious doubt that the state interest actually underlying HVIRA is concern for the several thousand Holocaust survivors said to be living in the State. . . . As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy.

539 U.S. at 425-27.

Moreover, the Second Circuit did not, as Petitioner argues, "expand[] on this Court's holding in *Garamendi*." Pet. at 8. Rather, as the Court stated, its holding was the *a fortiori* result of *Garamendi*. If anything, the circuit went to extremes in being solicitous of Petitioner's position, twice asking the State Department to confirm that the Government's foreign policy was in force and applies to the claims at issue.

Nor do any of the few district court decisions that Petitioner cites as conflicting with the Second Circuit, *see* Pet. at 10-11, actually do so, wholly aside from the fact that even if they did this would not warrant certiorari review. None of these cases addressed Holocaust-era claims of any nature, let alone Holocaust-era insurance claims. None of them held that the Executive's foreign policy could not displace state law claims. And, unlike here, in none did the Government's express and contemporaneous foreign policy disfavor litigation of the plaintiff's claim. For example, in *Cruz v. United States*, 387 F. Supp. 2d 1057 (N.D. Cal. 2005), the court denied

motions to dismiss claims by Mexican nationals who alleged they were not fairly paid for work in the United States during and after World War II. The district court expressly distinguished this case:

> Nor is there here, as there was [in *Garamendi*], evidence produced by the defendants that the United States government has consistently reaffirmed a policy of non-judicial dispute resolution for the particular claims at issue.

Id. at 1073-74.[12]

3. *Amici* Misapprehend The President's Claims-Settlement Power

The *amici* law professors and twelve members of Congress again argue, as they did in the Second Circuit, that the President is powerless to preempt claims connected to the resolution of wars and other

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[12] *Accord Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493, 498 (W.D. Tex. 2005) ("the Court is unconvinced that Congress intended that all claims against American corporations should be handled by the FCSC."); *see In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 79-80 (E.D.N.Y. 2005)(claims brought by Vietnam citizens for injuries caused by Agent Orange; *Garamendi* "not relevant to the problem at hand -- determining what was the applicable international law during the Vietnam War."); *see also id.* at 77-78 ("A significant distinguishing feature of the Vietnam War is the absence of Executive and Legislative decisions regarding reparations following termination of hostilities, in stark contrast to the large number of such decisions following World War II.").

foreign relations matters in the face of supposed Congressional opposition or State common law.

First, this is *not* a case involving Congressional opposition to Executive policies, within the meaning of "Justice Jackson's familiar tripartite scheme." *Medellin v. Texas,* 552 U.S. 491, 524-25 (referring to Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-38 (1952)). Congressional views in opposition are not manifested in an *amicus* filing by a tiny fraction of the members of the House. To the contrary, this is a case involving Congressional *support* for Executive policies, within the context of Justice Jackson's tripartite scheme. In *Garamendi,* the Court highlighted Congress's tacit *agreement* with the President's policy that all Holocaust-era insurance claims be resolved through ICHEIC:

> Indeed, it is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of HVIRA has been introduced in Congress repeatedly, but none of the bills has come close to making it into law. In sum, Congress has not acted on the matter addressed here. Given the President's independent authority "in the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval."

539 U.S. at 429 (quoting *Haig v. Agee,* 453 U.S. 280, 291 (1981)) (citations to former failed bills omitted; ellipsis original).

Moreover, in the years after *Garamendi*, additional proposed legislation to support Petitioner and other claimants, for which Petitioner's counsel and the lead House member named on the relevant *amicus* filing have been the primary champions, has been introduced but not advanced. *See* H.R. 1746, 110th Cong., 1st Sess. (2008); H.R. 4596, 111th Cong., 2nd Sess. (2010).

Nor is there force to the academic views of the *amici* law professors.[13] Their opinion that Executive foreign affairs powers should be narrowed as to give way to claims under state common law is contrary to accepted constitutional doctrines. As the *Garamendi* Court stated:

> [T]he President possesses considerable *independent* constitutional authority to act on behalf of the United States on international issues, and conflict with the exercise of that authority is a comparably good reason to find preemption of state law.

539 U.S. at 424 (citation omitted; emphasis added).

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[13] The lead counsel for the *amici* law professors, Michael D. Ramsey, is a leading "Federalist" pressing for the narrowing of Executive power. *See* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan L. Rev. 1963, 1965 (2003). Prof. Ramsey's views pre-date *Garamendi*, *see* Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133 (1998), and he, along with his co-*amici*, has been a vocal critic of the decision. *See* Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi* and Executive Preemption in Foreign Affairs, 46 Wm. & Mary L. Rev. 825 (2004).

A less partisan academic has explained that the position espoused by the *amici* professors, and adopted by the *amici* House members, is inconsistent with mainstream law:

> Professor Michael Ramsey, representing the federalist position, contends that . . . [executive] agreements can never supersede state law. In contrast, the *Restatement (Third)* [*of Foreign Relations Law*] . . . says that the Tenth Amendment does not limit the President's power to make sole executive agreements, and that "[a] sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law."

David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan L. Rev. 1963, 1965 (2003).

The third *amici*, the California State Senate -- which passed the law that was stricken in *Garamendi* -- argues speciously that the President and the Second Circuit somehow invalidated the common law of contracts and torts (presumably of Florida, where Petitioner sued). But the Executive merely specified the procedure by which Petitioner's claim should be resolved, and the court effectuated this as a matter of foreign policy by preempting a particular claim. The legal theories underlying Petitioner's lawsuit remain fully in force -- they simply have been precluded from application in this narrow context. There accordingly is no basis for the concern that the state legislature could find it

difficult to adopt laws of general applicability without further "clarification" from this Court. The opinion below no more invalidated the contract or tort law of Florida than *Dames & Moore v. Regan*, 453 U.S. 654 (1981), discussed *infra*, invalidated the contract law of California in disallowing an already-granted $3.4 million summary judgment awarded to Dames & Moore on its contract claim against Iran in favor of mandatory binding arbitration.

B. The Absence Of An Executive Agreement Between The United States And Italy Is Immaterial

1. *Garamendi* Is Based On Conflict With Presidential Foreign Policy, Not Executive Agreements

From its first sentence, the Petition is premised on the erroneous argument that *Garamendi* turned on the preemptive effect of *executive agreements* with foreign governments, rather than the *foreign policy* that the agreements embodied. *See* Pet., Question Presented ("In [*Garamendi*], this Court held that a California statute requiring European insurance companies to disclose Holocaust-era insurance policies was preempted by executive agreements with Germany and Austria which provided an alternative forum for resolution of such claims."). The congressional *amici* echo that reading of *Garamendi*, which *Garamendi* itself rejected.[14]

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[14] The California State Senate *amici*, by contrast, part company on this point and correctly appreciate that the *(cont'd)*

In *Garamendi,* the Court framed the dispute and its holding as turning on *foreign policy* preemption, not *executive agreement* preemption. At the outset of its analysis, the Court acknowledged that the executive agreements entered into by the Clinton Administration did not themselves preempt the California legislation, but that any preemption would have be based upon a conflict with the President's foreign policy:

> [V]alid executive agreements are fit to preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward. But petitioners and the United States as *amicus curiae* both have to acknowledge that the agreements include no preemption clause, and so leave their claim of preemption to rest on *asserted interference with the foreign policy* those agreements embody.

539 U.S. at 416-17 (citations and footnote omitted; emphasis added).

Thus, in nullifying California's attempt to assist prospective litigants, the *Garamendi* Court expressly based its holding on the conflict between

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Executive policy vindicated in *Garamendi* "was not contained in a single executive agreement." Brief of Amicus Curiae California State Senate at 10 (citing *Movsesian v. Versicherung*, 578 F.3d 1052, 1056 (9th Cir. 2008) (citing *Garamendi*)).

the President's foreign policy (not on any executive agreement) and California's approach:

> The question relevant to preemption in this case is conflict, and the evidence here is "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives."

Id. at 427, *quoting Crosby v. National Foreign Trade Council,* 530 U.S. 363, 386 (2000) (emphasis added; alteration original). Thus, this Court carefully noted that executive agreements were mere "exemplars" of the federal policy reflected in many other statements by representatives of the Executive. *Id.* at 422.[15]

It is for that reason also that *Garamendi* relied substantially on *Zschernig v. Miller,* 389 U.S. 429 (1968), which involved no Executive Agreement, and where the Court struck an Oregon probate statute prohibiting inheritance by nonresident aliens from Communist countries, because it was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress," *id.* at 432, and not because of any executive agreement. *Accord id.* at 440 (state laws

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[15] *Garamendi* explicitly credited the statements by officials from the Clinton, Bush and Obama Administrations on the issue of Holocaust-era insurance claims established Executive Branch policy. *See* 539 U.S. at 423 n.13. In the face of the findings in *Garamendi* and the declarations of Executive policy by the Bush and Obama Administrations in this case, it strains credulity for the congressional *amici* to argue that the lower court here was simply "guessing" or seeking out the "hidden" content of that policy.

"must give way if they impair the effective exercise of the Nation's foreign policy").

And, confirming that the *policy* conflict on which *Garamendi* turned was not tethered to any Executive Agreement, the Second Circuit recognized (as had the district court also) that Generali was a plaintiff in *Garamendi*, and despite vocal arguments by California about the absence of any executive agreement applicable to it, this Court did not craft an exception or exclusion for Generali to the holding nullifying California's statute:

> A further indication that the Court did not view the existence of an executive agreement as a prerequisite is that Generali was one of the plaintiffs in *Garamendi*, and was not excluded from the judgment on the ground that it is an Italian company and Italy is not party to an executive agreement.

592 F.3d at 119.

Is it therefore not surprising that the Second Circuit said about Petitioner's argument that it reads *Garamendi* unduly narrowly, because this Court based preemption on conflict with the Executive Branch's foreign policy, and not simply with the Executive Agreements embracing or reflecting that policy. *See* 592 F.3d at 116 ("The Court in *Garamendi*, however, did not find that the United States policy of encouraging resolution of Holocaust-era insurance claims through the ICHEIC depended on the existence of executive agreements. Rather, the Court viewed the executive agreements as the

product of the policy. The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it.").

By arguing that, absent an executive agreement between the United States and Italy, there is no basis for his complaint to be preempted, *see* Pet. at 12-18, Petitioner (and the *amici* who repeat that argument) simply take issue with *Garamendi* itself and with the Second Circuit's unremarkable application of that decision. This is not a basis for certiorari review.

2. Neither Lower Court Applications Of *Garamendi* Nor The Court's *Medellin* Decision Provides A Basis For Review

Petitioner contends that the lower courts are purportedly applying *Garamendi* differently than the Second Circuit. Even if true, this would not be a basis for certiorari review. But it is, in any event, not correct. For example, the Second Circuit's own earlier decision in *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57, 59 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2865 (2006), involved a putative class action against the Republic of Austria and various Austrian entities, to recover for compulsory confiscation of property in Austria during the Holocaust. The court found the claims to be nonjusticiable because of the Executive Branch's plenary authority over matters concerning the nation's foreign affairs. *Id.* at 71. That prior holding

of the Second Circuit is entirely consistent with the ruling in this case.[16]

Nor does *Medellin v. Texas*, 552 U.S. 491 (2008), which in relevant respects concerns federal involvement with state criminal procedures, not the long-recognized Executive power to compromise claims following a foreign war, cast doubt on *Garamendi* or the Second Circuit's ruling. *Medellin* concluded simply that a Presidential memorandum was insufficient to impart binding effect to a non-self-executing treaty, and that the treaty could become binding only through Congressional action, because the circumstances under which such treaty is ratified preclude the argument that Congress authorized the Executive to effectuate the treaty's ends on his own. *See id.* at 525-27. In so holding, however, this Court *expressly* distinguished *Medellin* from those cases involving foreign claims-settlements, including *Garamendi*, which were all supported by a "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned", unlike the "unprecedented action" at issue in *Medellin*. *See id.* at 530-32 (quoting *Garamendi* with approval for the proposition that "the conclusion that the President's control of foreign relations includes the settlement of

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[16] In *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005), Iraqi nationals sued government contractors for alleged torture at Abu Ghraib prison. The court denied the defendants' motion to dismiss on political question and preemption grounds, because the Government had not taken a firm position on how such claims should be resolved. *Id.* at 16. There is no comparable ambiguity as to Executive Branch policy as regards Holocaust-era insurance policies.

claims is indisputable"). Indeed, nowhere in the Court's discussion of *Garamendi* in *Medellin* is there even a hint that *Garamendi* is no longer good law. To the contrary, far from limiting *Garamendi*, as the *amici* professors suggest, *Medellin* confirms *Garamendi's* strong and continuing vitality.

C. The Remedy Chosen By The President Remains Available To Petitioner

The Petition's concluding argument, that *Garamendi* ought not to apply where a plaintiff is left with no possibility of relief, *see* Pet. at 19-20, is based on the false premise that no relief is (or was) available to Petitioner. Rather, he eschewed all past and existing remedies, and his real complaint is that his preferred forum is unavailable. As made clear by the United States' submission to the Second Circuit, Petitioner today, and in the future, can apply either directly to Generali or to the New York Holocaust Claims Processing Office, and he again will be offered the $5,800 that ICHEIC's claimant-friendly valuation standards provide for in his circumstances. *See* Pet. App. 77a. Indeed, that amount would be adjusted upward in light of the passage of time since Generali first made ICHEIC offer years ago.

In any event, this Court long-since held that the power of the Executive to compromise or settle claims -- even to the extent of stripping the claimant of a judicial award -- in advancing the Government's foreign affairs interests is unaffected by the claimant's consent or even the availability of *any* alternative remedy. Thus, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld Presidential orders nullifying claims filed in U.S.

courts by U.S. nationals against Iran, based in part on precedents recognizing broad Executive authority. *Id.* at 679-80 ("it is also undisputed that the United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.") (citation and quotation omitted). The President's power to do so "does not depend on his provision of a forum whereby the claimants can recover on those claims." *Id.* at 687. Thus, the absence of any remedy, let alone Petitioner's preferred remedy, is not a basis for challenging the opinion below much less for certiorari review.

CONCLUSION

The Petition for a writ of certiorari should be denied.

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Respectfully submitted,

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